

4 Official Opinions of the Open Meetings Compliance Board 46 (2004)

CLOSED SESSION PROCEDURES – WRITTEN STATEMENT – INCLUSION OF STATEMENT IN AGENDA COMPLIES WITH ACT – OMISSION OF REASON FOR CLOSING VIOLATES ACT – MINUTES – CONTENTS – BRIEF DESCRIPTION OF REQUIRED ELEMENTS COMPLIES WITH ACT

April 5, 2004

Mr. Conrad P. Potemra

The Open Meetings Compliance Board has considered your complaint that the Commissioners of Poolesville violated the Open Meetings Act by failing to provide sufficient detail in the process of closing their meeting on January 5, 2004, and in the minutes of that closed session. For the reasons set forth below, the Compliance Board finds that the Town Commissioners did not violate the Act in their motion to close the meeting or in the minutes pertaining to the closed session, but they did violate the Act by failing to provide sufficient information in the written statement made prior to the closed session.

I

Complaint and Response

The complaint alleged that, when the Commissioners of Poolesville adjourned into closed session on January 5, 2004, the motion merely cited a provision in the Open Meetings Act authorizing closed sessions to discuss specific personnel matters and stated that the purpose of the session was “to discuss a Board vacancy.” The complaint alleged that this level of detail was insufficient to comply with the Act. In addition, the complaint quoted the following excerpt from the minutes of the Town Commissioners as the summary of this closed session: “The Commissioners met in Executive Session to review the Parks, Recreation, and Streets Board recommendation and to discuss the applications to fill the Parks, Recreation, and Streets Board vacancy. After a short discussion, the Commissioners agreed with their recommendation and chose to appoint Doug McKenney.” The complaint alleged that this, too, was insufficiently detailed and so violated the Act.

In a timely response on behalf of the Commissioners of Poolesville, Alan M. Wright, Esquire, asserted that the Town “complied with both the letter and the spirit of the Act.” With respect to the closing of the January 5 meeting, Mr. Wright wrote that the Town Commissioners “stated in closing the meeting and in writing on the January 5 agenda that the purpose was to ‘discuss a Board vacancy.’ While it might have been more explicit to name the Parks Board, there was clearly no attempt to conceal the identity of the Board in question, a detail of which any citizen could ascertain by asking at the meeting or calling the Town Hall at any time. The Parks Board was the only Board with a vacancy at that time, as had been well advertised.” Mr. Wright provided supporting detail about the numerous instances in which the fact of the vacancy on the Parks Board had been made known to the public. Mr. Wright further contended that the minutes contained all of the information required by the Open Meetings Act.

II

Procedures for Closing A Meeting

A. Vote

A meeting subject to the Open Meetings Act may not be closed unless “a majority of the members of a public body present and voting vote in favor of closing the session.” §10-508(d)(1) of the State Government Article, Maryland Code.¹ The Act also requires the presiding officer to “conduct a recorded vote on the closing of the session.” §10-508(d)(2)(i). In accordance with customary parliamentary procedure, this “recorded vote” would be made by motion, but the Act does not specify any particular level of detail for the motion itself.

Because the Commissioners of Poolesville took a recorded vote to close their meeting on January 5, and all present unanimously supported the motion, the Town Commissioners complied with the Act’s requirement regarding a vote.

B. Written Statement

A vote to close a meeting is not enough to comply with the Act. The Act also requires the presiding officer to “make a written statement of the reason for closing a meeting, including a citation of the authority under the section, and a listing of the topics to be discussed.” §10-508(d)(2)(ii).

¹ All statutory references in this opinion are to the State Government Article.

1. Time of preparation.

The Act does not prohibit the presiding officer from preparing a written statement in advance, anticipating the closing of the meeting. The written statement, however, must be available at the time that the public body actually decides to go into closed session. This is so because the Act anticipates the possibility that someone in attendance will object: “If a person objects to the closing of the session, the public body shall send a copy of the written statement ... to the [Compliance] Board.” §10-508(d)(3).²

As we understand it, the practice in Poolesville is for meeting notices to include an agenda, and for the agenda to contain a statement about any anticipated closed session. For the January 5 meeting, the agenda, which was posted on December 31, 2003, included the following item for the Commissioners’ closed session: “Adjourn into executive session as provide for by the Annotated Code of Maryland, State Government: Section 10-508(a)(1)(i) to discuss a Board vacancy.” Presumably, the Acting President of the Commissioners viewed the agenda item as the written statement that he was required to make. Because the agenda obviously is available at the time of the meeting, and assuming that the session is in fact closed on the basis described in the agenda item, we see no legal objection to this method.

2. Content of statement.

A statement must contain three elements: the reason for closing the meeting, the citation of the Act’s exception that authorizes the closing, and a listing of the topics to be discussed. Although a public body is not obliged to reveal in the statement information that is protected by the applicable exception, some account beyond uninformative boilerplate must be given of the topic and the reason for closing. *See, e.g.,* Opinion No. 01-12 (2001), *reprinted in 3 Official Opinions of the Open Meetings Compliance Board* 136, 139.

The written statement requirement serves several objectives, none of which can be achieved if the statement merely consists of a statutory citation and a bit of cryptic boilerplate. First, the written statement gives the public body one last opportunity to consider whether a closed session really is necessary. The written statement of the reason, in particular, enables each member of the public body, before voting, to consider whether the reason is sufficient to depart from the Act’s norm of openness. Second, the written statement helps

² The sending of a written statement in the aftermath of an objection does not invoke the Compliance Board’s complaint process.

enable members of the public who will be barred from the closed session to understand that this exception to the principle of openness is well-grounded. Finally, the written statement is an accountability tool, for an interested observer can compare what is said in the written statement preceding the meeting with what is said in the minutes summarizing the actual conduct of the meeting, and infer whether the public body hewed to the topic that justified the closing.

In the opinion of the Compliance Board, the written statement prepared for the January 5 meeting did not comply with the Act. Someone reading the written statement ought to have the answer to two questions: what are the Commissioners planning to talk about (“topics to be discussed”), and why should this topic be discussed in closed session (“the reason for closing the meeting”). Someone reading the relevant portion of the agenda for January 5 would know only that the topic of discussion would be a Board vacancy. The interested observer, from the statement on the agenda, would not even know which Board was to be discussed. The fact that information about the vacancy had appeared in other publicly available sources is immaterial. An observer is not obliged to consult external sources in order to learn what the topic of the closed meeting is to be. In addition, the statement omits any account of the reason for closing the meeting. Presumably, the reason was so that the Commissioners could discuss the qualifications of candidates candidly without potential harm to the reputation of any applicant. That this may be apparent upon reflection is no excuse for omitting it, or something similar, from the written statement.

III

Minutes

When a public body meetings in closed session, it is required to make certain disclosures about the session in the minutes of the next open meeting. This disclosure consists of a statement of the time, place, and purpose of the closed session; a record of the vote of each member as to closing the session; a citation of the authority under the Act for closing the session; and a listing of the topics of discussion, persons present, and each action taken during the session. §10-509(c)(2).

The minutes for January 5 do reflect all of the required elements. In particular, the minutes reflect that the topic of discussion was “the applications to fill the Park, Recreation, and Streets Board vacancy.” Moreover, the action taken, the appointment of Mr. McKenney to fill the vacancy, was clearly

stated. Anyone reviewing these minutes would gain the information that the Act requires be disclosed. There was no violation in this regard.

IV

Conclusion and Summary

The Open Meetings Compliance Board finds that the Commissioners of Poolesville violated the Open Meetings Act by failing to include sufficient information in the written statement made prior to the closing of the meeting on January 5, 2004, but did not violate the Act in voting to adjourn to the closed session or in the preparation of minutes with respect to the closed session.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb